IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA.

APPEAL UNDER E.S.I. ACT 9 OF 2006

1. Employees State Insurance Corporation,
   Through its Deputy Regional Director,
   Panchadeep Bhavan, EDC Plot No. 23,
   Patto, Panaji-Goa.

2. Mr. Shejwadkar, Recovery Officer,
   Panaji-Goa. .... Appellants

Versus

Goa Bottling Co. Pvt. Ltd.,
Arlem, Raia,
Salcete Goa. .... Respondent

Mrs. A. Agni with Mr. M.S. Prabhudessai, Advocate for Appellants.

Mr. V.A. Palekar, Advocate for the Respondent.

CORAM : **P.V. KAKADE, J.**

Date of reserving the judgment :
30/08/2006

Date of pronouncing the judgment :
13/10/2006

JUDGMENT :

Heard both sides. By consent, Rule. Rule made returnable forthwith.

2. This is an appeal filed by the Employees State Insurance Corporation (hereinafter called as the 'appellant Corporation') against the order passed by District Judge, South Goa, Margao, who is designated Judge for the Employees State Insurance Court.

3. The respondents are engaged in bottling and sale of aerated waters as well as soft drinks and have their bottling unit at Arlem, Raia, Salcete-Goa and they are covered under the provisions of the Employees State Insurance Act. By order dated 8/3/1994, passed under Section 45-A, the Corporation assessed the contribution payable by the respondent at Rs. 2,00,863/- for the period from July 1983 to 1990 plus interest amounting to Rs. 93,115/- up to 31/12/1993. The said order came to be set aside on the ground that it was not a speaking or reasoned order and that there was nothing on record to show that determination of amount made by the Corporation was based on materials produced by the employer. The Corporation was directed to determine the amount afresh in accordance with law after giving reasonable opportunity to the applicant of being heard.

4. The Corporation therefore, gave due hearing to the respondents

and passed an order under Section 45-A of Employees State Insurance Act dated 3-5/6/1998, claiming contribution amounting to Rs. 1,57,872/- for the period from July 1987 to March 1990 with interest of Rs. 1,54,204/- up to 31/3/1998 i.e. at the rate of 15% p.a. for further default from 1/04/1998 till further date of payment. The respondents paid Rs. 20,584.50 paisa as their contribution on 29/3/1999 and filed an application under Section 75 of the Employees State Insurance Act in November 1999, only after recovery proceedings were issued in October 1999 by the appellants. The appellant Corporation filed their written statement and contended that as the principal employer it was the duty of the respondents to furnish all details pertaining to all wages paid to the contractor workers and that they had failed to produce the necessary record. After evidence was led in the matter, vide order dated 30/10/2004, the trial Court partly allowed the application filed by the Corporation holding that the contribution was required to be calculated on the basis of Circular dated 16/11/1981 and thereby modified the order passed under Section 45-A indicating that amount payable would be Rs. 62,530/- with interest @ 15% p.a. after deducting the amount of Rs. 20,854.20 paisa.

5. The respondents thereafter filed Review Petition contending

that levy of interest @ 15% p.a. amounted to error patent on face of the record and prayed for review of the order dated 31/10/2004. The said application dated 4/12/2004 was allowed by Employees State Insurance Court, Margao by order dated 30/4/2005.

6. At this juncture, it may be noted that in the course of adjudication, the lower Court has held that the contribution required to be paid by the respondents on the basis of the Circular dated 16/11/1981 after giving overall benefit of deduction of 25% of the total amount of the bills came to Rs. 62,530.60 paisa on six items including;

(i) Loading and Unloading,
(ii) Freight charges,
(iii)Repairs and maintenance to building,
(iv)Repairs and maintenance to machinery,
(v) Miscellaneous expenses, and,
(vi)Cleaning expenses.

The learned Counsel for the appellant-Corporation fairly conceded that item numbers (iv) and (v) were not required to be covered and claim in that regard was not pressed, and therefore, we need not take into account those amounts calculated for the purpose of repairs and maintenance to machinery and miscellaneous expenses.

7. The learned Counsel for the appellant submitted that it was an established and admitted position that the employees doing loading and unloading work were doing the work of establishment and, therefore, would be covered under the definition of “Employees” in terms of Section 2(9) of Employees State Insurance Act and, therefore, applying the relevant test of trial of activities of loading and unloading and the employees doing said work, would come within the purview of definition of “Employees” in terms of Section 2(9) of Employees State Insurance Act. It was further submitted that judgment of the lower Court suffered from perversity in that there was absolutely no evidence on record and matter was decided on a Circular dated 16/11/1981 which on its face applied only in a case where a labour is not bifurcated from the charges for maintenance and repairs of buildings. In that case it was permissible to make wholesale deduction of 25% in respect of items as set out in the dispute. In other words, it was submitted that the Circular dated 16/11/1981 on which basis the entire dispute is adjudicated is not applicable to items involved, and, therefore, the order requires interference by this Court.

8. On perusal of the entire record it is seen that admittedly, the payments of loading and unloading of crates of bottles of aerated drinks and

other soft drinks were being paid by the applicant and the employees were doing the work of loading and unloading of the bottles/drinks/soft drinks at the bottling unit of the concerned company. The test as to whether a person is an employee as defined under Section 2(9) of the Employees State Insurance Act would be, whether the employees are employed by or through the immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of such factory or establishment and the object of Employees State Insurance Act is to make principal employer primarily liable for the insurance of any kind of employees even casual employees whether they are in the work or are merely in connection with the work of the establishment.

9. The learned Counsel for the appellant sought to rely upon the ruling of the Apex Court in the case of ***Rajakamal Transport And Another*** **versus** ***Employees State Insurance Corporation,*** **(1996) 9 SCC 644,** wherein the scope of Section 2(9) of the Employees State Insurance Act is examined. It was held that hamalis engaged by a carrier for loading and unloading of goods undertaken by him for carriage are although paid at

piece rate after collecting the charges from the customers, still they are covered under Employees Insurance Act. The relevant test for determining their status is that they worked in connection with the work of the establishment and not the mode of payment and, therefore, they worked under the control of the carrier. In the fact situation involved in the said ruling, the appellants' regular business was transportation of the goods entrusted to them as carriers. When the goods were brought to the warehouse of the appellants, necessarily the appellants were to get the goods loaded or unloaded through the hamalis and they control the activities of the loading and unloading. Therefore, although instead of paying the charges themselves, the appellants collected it as a part of the consideration for the transport of goods from the customers and paid the said amount to the hamalis. The test of payment of salary or wages in the facts of the said case were not relevant. What was important was that hamalis worked in connection with the work of the establishment. The loading and unloading of the work was done at the appellants' directions and control.

10. This ruling is apparently applicable to the present set of facts because here the defence of the respondents is to the effect that the goods

produced by them were sold through dealers and for the purpose of distribution and selling, the respondents had appointed stockists at various places and their contractual appointments for the said purpose. The stockists were accordingly required to arrange for their own transport purpose for loading the products. The products by way of bottles were filled in crates and they were required to be lifted at the factory gate for which purpose the contractors engaged own labours and for the purpose of convenience and on requests of stockists the respondents consented to make payments to the contractors and the said amount was then to be recovered from each and every stockists by a separate bill. Be as it may, the fact remains that what is important is not the mode of payment but the fact that worked was made in connection with the work of the establishment of the respondents.

11. The appellants have further submitted that trial Court has adjudicated the entire dispute on the basis of contents of Circular dated 16/11/1981. In fact it refers to payments which related to repairs and maintenance of the factory/establishment building and will not apply to other payments. The Circular is on the subject of payments of contribution on items of which employer is not in a position to bifurcate labour charges

vis a vis material charges therefore, it is obvious that in the present case the amount due towards loading and unloading would never come within the purview of impugned Circular, as it is the respondents' own case that independent arrangement for separate billing was made. Similarly, freight charges, repairs and maintenance of the machinery, cleaning expenses also would not come within the purview of the said Circular. However, it appears that the learned Employees State Insurance Court did not go into details of the impugned Circular itself and thought it fit to make wholesale application thereof to the disputed amounts which would not be permissible. It is quite obvious that the activities like loading and unloading, freight charges were with regard to the movements of soft drinks and aerated drinks and had no connection with other items sought to be saddled with contribution amount. The only item which would be covered within the purview of the Circular would be repairs and maintenance of the building.

12. For the reasons recorded above, I hold that the learned Employees State Insurance Court has erred in relying upon the impugned Circular of the year 1981, while making its wholesale application to the all items and to that extent the order is required to be set aside. The only item

which would be covered by the said Circular dated 16/11/1981 would be maintenance of building and not others. So far as items of repairs and maintenance to machinery and miscellaneous expenses are concerned the appellant has conceded those aspects and has not pressed claim for the said amount. In the result, appeal is partly allowed with no order as to costs. Order passed by District Judge, South Goa dated 30/10/2004 is hereby set aside. It is directed that Circular dated 16/11/1981 would be applicable only to the item of maintenance to building and not to any other items in dispute. The items; (i) Repairs and maintenance to machinery and (ii) Miscellaneous expenses, are required to be eliminated from contribution as not pressed by the appellants. The Corporation shall also give adjustment of the amount of Rs. 20,854.50 paisa to the respondents-Company which is already paid. With these directions the appeal stands disposed of with no order as to costs.

P.V. KAKADE, J.

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